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In The

Supreme Court of the United States

October Term 1978

No 78-759

DAVID H. LEROY, Attorney General of Idaho,
and TOM D. McELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF OHIO

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INDEX

	Page
JURISDICTION	1
STATEMENT OF POSITION AND SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	19

CITATIONS

Cases

Continental Coal Corp. v. Roszelle Brothers, 242 F. 243 (6th Cir. 1917)	13
Cort. v. Ash, 422 U.S. 84 (1975)	13
Ex parte Young, 209 U.S. 123 (1908)	15, 16, 17
Great Western United Corporation v. Wayne L. Kidwell, Attorney General of Idaho, Tom D. McEldowney, Director of the Department of Finance of the State of Ohio, 577 F.2d 1256, (5th Cir. 1978)	4
Hall v. Geiger-Jones Co., 242 U.S. 539 (1917)	11
Hanson v. Denckla, 357 U.S. 235 (1958)	17
Hines v. Davidowitz, 312 U.S. 52, 61 (1940)	4
Hodges v. Georgia Kaolin Co., 207 F. Supp. 374 (M.D. Ga. 1962)	13
Hooper v. Mountain States Securities Corp., 282 F.2d 195 (5th Cir., 1960); cert, denied 364 U.S. 814 (1961)	18
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	16
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	16
Judice v. Vail, 45 U.S.L.W. 4269 (March 22, 1977)	16
Kulko v. Superior Court, . . . U.S. . . ., 98 S. Ct. 1690 (1978)	18
Merrill, Lynch, Pierce, Fenner & Smith, Inc., v. Ware, 414 U.S. 117 (1973)	6
Piper v. Chris Craft Industries, Inc., 430 U.S. 1 (1977)	4, 6, 13
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	9, 11

CITATIONS

	Page
Potoeni v. Asco Mining Company, 196 F. Supp. 913 (W.D. Pa. 1960)	13
Railroad Commission v. Pullman Co., 312 U.S. 496 (1940)	16
Riggs v. Island Creek Coal Company, 387 F. Supp. 1363 (S.D. Ohio 1974)	13
Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975)	4
Sante Fe Industries v. Green, 430 U.S. 462 (1977)	13
SEC, v. National Securities, Inc., 393 U.S. 453 (1969)	6
Shaffer v. Heitner, 433 U.S. 186 (1977)	17
Silver v. New York Stock Exchange, 373 U.S. 341 (1963)	6
Spector v. Rex Sierra Gold Corp., 227 F. Supp. 550 (S.D.N.Y. 1964)	13
Travelers Health Ass'n. v. Virginia, 339 U.S. 643 (1950)	13
Webster v. Wilke, 186 F. Supp. 199 (S.D. Ill. 1960)	13
Younger v. Harris, 401 U.S. 37 (1971)	16

Constitution, Statutes and Rules

United States Constitution	
Article 1, Section 8, Clause 3	2, 9
Article 6, Clause 2	2
11th Amendment	15
15 U.S.C. Sections 78m (d,e), 78n(d-f) (1970) 13 (d,e), 14 (d-f) of the 1934 Securities Exchange Act – the Williams Act Amendments	2, 4, 5, 6, 7, 8
15 U.S.C. Section 78aa (1970) (Section 27 of the 1934 Securities Exchange Act)	2, 9, 15
15 U.S.C. Section 78bb(a) (1970) (Section 28(a) of the 1934 Securities Exchange Act)	3, 11, 19
15 U.S.C. Section 18(a) (1977)	7
28 U.S.C. 1391(b)	2
Idaho Code Sections 30-1501 to 30-1513	3, 5
Tex. Civ. Stat. Ann. Art. 2013(b)	2, 14, 18, 19
16 C.F.R. Section 801.1-803.9 (1978)	7

CITATIONS

	Page
Proposed Rule 14 e-2(a) 1976-1977 Transfer binder, CCH Fed. Sec. L. Rep. paragraph 80, 659 L	7

Treatises and Articles

E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control* (1977)	8
Miskin & Maloney, *Great Western United Case: End of State Takeover Laws?*, N.Y.L.J., Aug. 29, 1978 at col. 1, page 1, col. 3, page 2, col. 1, page 3	5
53 N.Y.U.L. Rev. No. 4, 872 *The Constitutionality of State Takeover Statutes: A Response to Great Western* (1978)	5, 6, 9, 12, 13
Shipman, Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act, 21 Case W. L. Rev. 722 (1970)	12

Miscellaneous

Senate Committee on Banking and Currency, Full Disclosure of Corporate Equity Ownership in Corporate Takeover Bids, S. Rep. No. 550, 90th Cong. 1st Sess. 1967	13

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JURISDICTION

This Amicus Curiae Brief of the State of Ohio is submitted by the Attorney General of Ohio pursuant to the provisions of Rule 42(4) of the Rules of Practice of the Supreme Court of the United States. It is submitted in support of the position of the State of Idaho and its officials, David H. Leroy, Attorney General of Idaho, and Tom D. McEldowney, Director of the Department of Finance of the State of Idaho.

STATEMENT OF POSITION AND SUMMARY OF ARGUMENT

On August 10, 1978 the United States Court of Appeals for the Fifth Circuit determined that the Idaho Corporate Takeover Law, Idaho Code §§ 30-1501 to 30-1513, was preempted by supremacy clause of United States Constitution, Art. 6c1.2 because the Idaho statute conflicted with the federal scheme for the regulation of corporate tender offers embodied in the Williams Act amendments to the 1934 Securities Exchange Act, 15 U.S.C. §§ 78m (d, e) and 78n (d-f). The Fifth Circuit also determined that the Idaho statute imposed constitutionally invalid burdens upon interstate commerce pursuant to the commerce clause of the United States Constitution, Article 1, § 8, cl. 3. Personal jurisdiction over the Idaho officials was determined to be appropriate in the United States District Court for the Northern District of Texas upon either the Texas long arm statute, Tex. Civ. Stat. Ann. art. 2031(b) or § 27 of the 1934 Securities Exchange Act, 15 U.S.C. § 78aa (1976). Venue was affirmed pursuant to § 27 and the general venue provisions of 28 U.S.C. § 1391(b).

The State of Ohio through its Attorney General participated in the proceedings before the Fifth Circuit by submitting an Amicus Curiae Brief and presenting oral argument. The positions expressed by the State of Ohio before the Fifth Circuit remain viable before this Court. The position of the State of Ohio, based upon its experience in the tender offer field is therefore, in opposition to the determinations made by the district court which were affirmed by the Fifth Circuit.

Contrary to the decisions of the district court and the Fifth Circuit, state tender offer statutes do not conflict with the Williams Act amendments to the 1934 Act. Both state and federal regulation in this field have as their goal the protection of investors. The Williams Act presumably achieves that goal by providing investors with certain

disclosure and time requirements which are intended to enable the equity shareholders of an offeree corporation to make an informed investment decision. With admittedly longer time-requirements and somewhat altered disclosure provisions, state statutes accomplish the same result. Rather than being in conflict, state and federal schemes for the regulation of tender offers are compatible. Indeed it is submitted that the application of state tender offer statutes has been more successful, relative to the Williams Act, in accomplishing the goal of investor protection.

Historically, the entire field of securities regulation has been one of concurrent jurisdiction between state and federal authorities. Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a), clearly permits the existence of state securities laws and the legitimate benefits derived through the existence of state statutes do not unconstitutionally impinge upon interstate commerce. This is particularly true when state statutes are appropriately viewed as the regulation of internal corporate affairs.

Finally the invalid assertion of jurisdiction over the Idaho officials in this case by the United States District Court for the Northern District of Texas transcends clearly established principles of due process. The court decisions in this case permit the assumption of jurisdiction over any state official in any forum in the United States upon the basis that the state official could perceive foreseeable consequences in the foreign forum. If this standard is accepted as the permissible scope of jurisdiction over a state official, then longstanding concepts of federalism and comity must fall.

ARGUMENT

I. PREEMPTION

The Fifth Circuit determined that the Idaho Corporate Takeover Law[1] was preempted due to the adoption

[1]Idaho Code Sections 30-1501 to 30-1513.

of the Williams Act amendments[2] to the 1934 Securities Exchange Act.[3] In its analysis the Fifth Circuit concluded that the Idaho statute conflicted with the Williams Act in such a fashion that the state law stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[4] The purpose of the Williams Act is investor protection[5] which is accomplished through what the Fifth Circuit labeled as the "market approach"[6] to the regulation of tender offers. The hallmarks of the market approach and the foundation for the operation of the Williams Act is the neutrality and evenhandedness with which the Federal law treats offeror and offeree corporate management.[7]

In conflict with the market approach of Congress is what the Fifth Circuit identified as the "fiduciary approach"[8] embodied in the Idaho statute. The court reasoned that the ability of offeree management under the Idaho statute to cause delays in the tender offer process

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[2]15 U.S.C. §§ 78m(d, e), 78n (d-f) 1970; § 13(d, e), 14 (d-f) of the Securities Exchange Act of 1934 (hereinafter the "Williams Act").

[3]15 U.S.C. § 78a et seq. ("1934 Act").

[4]*Great Western United Corporation v. Wayne L. Kidwell Attorney General of Idaho, Tom D. McEldowney, Director of the Department of Finance of the State of Idaho,* 577 F.2d 1256, 1280 (5th Cir. 1978) (hereinafter 577 F.2d at ____.)
Hines v. Davidowitz, 312 U.S. 52, 61 (1940).

[5]577 F.2d at 1276.

[6]577 F.2d at 1276.

[7]577 F.2d at 1277 citing Senate Report No. 550, 90th Congress 1st Sess. at 3 (1967); *Piper v. Chris Craft Industries, Inc.,* 430 U.S. 1, 30-31, (1977); *Rondeau v. Mosinee Paper Corp.,* 422 U.S. 49 at 58-59 (1975).

[8]577 F.2d at 1279.

by involving regulatory review[9] indicated a preference for incumbent management over management of the offeror.[10] The district court concluded that the pro-incumbent management provisions of the Idaho statute evinced a legislative purpose "to inhibit tender offers for the benefit of management".[11] While the Fifth Circuit was unwilling to embark upon an analysis of the purposes of the Idaho legislature, it nevertheless clearly indicated that the preference of incumbent management was the reason for preempting the Idaho statute.[12]

The Fifth Circuit also determined that the disclosures required by the Idaho statute were incompatible with federal requirements and the market approach in both the preemption and commerce rulings. This was premised on what the Fifth Circuit labeled as reports "so complicated that few shareholders would want to read them."[13] Unfortunately the Fifth Circuit did not identify what material required by the Idaho statute would make the reports so detailed as to constitute an obstacle to the accomplishment of the purposes and objectives of Congress. It is also unfortunate that the court did not recognize that the disclosures required by the Idaho statute are either contained in the Williams Act or are based upon the information required by a Form S-1 utilized for new registrations under the 1933 Securities Act.[14] The con-

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[9]Idaho Code § 30-1503(4).

[10]577 F.2d at 1279.

[11]*Great Western United Corporation v. Wayne L. Kidwell et al.,* 439 F. Supp. 420, 437 (1977) (hereinafter 439 F. Supp. at ____).

[12]577 F.2d at 1279-1280.

[13]577 F.2d at 1280-1281.

[14]53 N.Y.U. L. Rev. No. 4, 918(1978) cf. Miskin & Maloney, *Great Western United Case: End of State Takeover Laws,* N.Y. L.J., Aug. 29, 1978 at col. 1, page 1, col. 3 page 2, col. 1 page 3.

clusion is therefore without merit unless the court is willing to evaluate the entire scope of federal securities disclosure.

Beyond the infirmities of the Fifth Circuit's disclosure determinations an overall analysis of state tender offer statutes reveals that, whatever the initial cause for their adoption,[15] they have achieved the purpose of the Williams Act – investor protection. They have achieved that goal in a manner which does not conflict with the Williams Act. Recent decisions of this Court have affirmed the role of the states in the securities field.[16] The Court has also clearly indicated that the purpose of the Williams Act to be investor protection.[17] The evenhandedness of the Williams Act is not a goal in and of itself but is a mechanism to accomplish the overall purpose. Ironically, not only do the state statutes achieve the goal of investor protection but the mechanical operation of the state statutes and the Williams Act is similar.[18] The difference between the state tender offer laws and the Williams Act is one of degree. It is not one of conflict. The state statutes have achieved investor protection by providing delays in the tender offer process. It is true that these delays are greater than those contemplated by the Williams Act.

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[15]It has been asserted that the state takeover acts were adopted in response to tender offers or rumored tender offers for major state industries in a given state. See N. 21 and accompanying text. 53 N.Y.U.L. Rev., No. 4. 876 (1978).

[16]*Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware,* 414 U.S. 117 (1973); *Silver V. New York Stock Exchange,* 373 U.S. 341 (1963). *Piper v. Chris Craft Industries, Inc.* 430 U.S. I, 29, (1977). *SEC v. National Securities Inc.,* 393 U.S. 453, 461 (1969), § 28(a) 15 U.S.C. § 78 bb(a).

[17]*Piper v. Chris Craft, supra.*

[18]53 N.Y.U.L. Rev. No. 4, 878-886 (1978).

The district court and the Fifth Circuit determined that the state mandated delays were a protectionist tool solely for the benefit of entrenched management and presumably enabled offeree management to totally defeat a tender offer.[19] The Fifth Circuit found these state delays to be disruptive of the "market-neutrality-approach" of Congress. In support of its position the Fifth Circuit cites testimony given in Congress on the Hart, Scott, Rodino Antitrust Improvements Act of 1976.[20] However, the rules adopted under the Antitrust Improvements Act effective on September 5, 1978 provide delays greater than the Williams Act.[21] Indeed, even the Securities and Exchange Commission has in Proposed Rule 14e-2(a) extended the period for making an offer.[22] Although the court's reliance on the precedents it cites is less than strongly supportive of its position, the delays caused by state statutes are a well recognized difference between the Williams Act and the state statutes. It is the effect of these delays and presumably their conflict which is a central issue in the preemption of the state statutes.

Rather than being in conflict with the Williams Act, delays caused by state statutes have benefited investors and have furthered the purposes of the Williams Act. State statutes have created a bidding market for the securities of the offeree corporation which has redounded to the benefit

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[19]577 F.2d at 1278; 439 F. Supp. at 437.

[20]577 F.2d at 1277, 1278.

[21]15 U.S.C. § 18a (West Supp. 1977); 16 C.F.R. § 801.1-803.9 (1978).

[22]Proposed Rule 14e-2(a) 1976-77 Transfer Binder, CCH Fed. Sec. Law Rep. ¶ 80,659L.

of the offeree shareholder.[23] A by product of that delay has been an end to the so-called "Saturday night special" which was an acceptable technique under the Williams Act.[24] In addition to creating a bidding market which is the antithesis of the knee jerk response forced upon investors by the Saturday night special, state tender offer acts have through their delays provided sufficient time for investors to review the offering documents and evaluate their alternatives. In short, the statutes have provided the investor with the necessary time to evaluate his alternatives and make an investment decision.

In addition the statutes have aided in the accomplishment of the other goals attributed to the Williams Act. Rather than frustrating the neutrality between managements, the state statutes have placed the managements on a more equal footing. Target management is expected to review the offer, and respond to that offer in an exceedingly short period of time. This task simply cannot be completed within the permissible time frames of the Williams Act.[25] Certainly these tasks cannot be performed in such a time frame consistent with management's well-recognized fiduciary duties which of necessity come into play.[26]

[23]The primary example of such a result is the tender offer of United Technologies for Babcock and Wilcox. Delay caused by the Ohio Statute (R.C. § 1707.041) resulted in a bidding market for the shares of Babcock & Wilcox when J. Ray McDermott entered the contest and was eventually successful by acquiring Babcock & Wilcox at $65. per share – $23. above the United Technologies initial offer and $30. above the selling market for Babcock and Wilcox prior to the tender offer. Other examples from the Ohio experience include the General Cable offer for Microdot where Northwest Industries intervened and was successful with a competing offer of $4. above the initial offering price of $17. Thrall Car Manufacturing lost a tender offer struggle to Sampson & Sessions when the latter corporation completed the offer at $3. above the initial bid. In the Esmark attempted takeover of Inmont the two corporations reached an agreement in the face of the Ohio statute which permitted Inmont to seek a better offer. Carrier Corporation was successful in acquiring Inmont at $32. per share. The initial Esmark offer was $25. per share.

[24]E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control*, 218 (1977).

An underlying premise of the Fifth Circuit analysis insofar as conflicts between the state statutes and the Williams Act appears to be the conception that the State statutes provide sufficient time for offeree managements to absolutely defeat an offer. Historically this is not the case. Due to the tremendous attention focused on the offeree corporation by the news media it has almost invariably been acquired by the initial offeror or a subsequent bidder or through a friendly merger with a "white knight". The fact of the matter is that an offeree corporation, once subjected to a tender offer, has surrendered its separate existence.[27] Ultimately, therefore, the decision is not in the hands of offeree management but in the hands of the investor.[28]

II. COMMERCE CLAUSE

The Fifth Circuit also affirmed the decision of the district court that the Idaho statute constitutes an undue burden on interstate commerce and is therefore violative of the Commerce Clause, Article 1 § 8, of the United States Constitution. The Fifth Circuit predicated its determination upon the balancing test enunciated in *Pike v. Bruce Church, Inc.*[29] The test enunciated in *Pike* indicates that

[25]53 N.Y.U.L. Rev. No. 4, 874 (1978).

[26]Id at 899 N. 196, 197.
Id at 915 N. 314.

[27]53 N.Y.U.L. Rev. No. 4, 903, 913.

[28]Id.

[29]397 U.S. 137 (1970).

the general rule for determining the validity of a state statute affecting interstate commerce is to determine, "where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[30] The district court determined that the sole purpose of the Idaho statute was the protection of incumbent management and that it therefore had no legitimate local purpose.[31] The Fifth Circuit assumed that the Idaho statute had two ligitimate local purposes. Those legitimate purposes were investor protection and civic responsibility on the part of local corporations.[32] Although the Fifth Circuit found investor protection to be a legitimate local purpose the court candidly indicated that this interest was attenuated due to the fact that Idaho had only two percent of the shareholders of the offeree corporation, the Sunshine Mining Company, within the state's boundaries.

Against these two ligitimate local purposes the Fifth Circuit balanced what it incorrectly perceived as the burdens on interstate commerce. Those burdens included the disruption of the national securities markets,[33] the potential of offerors making low offers when initially faced with state statutory opposition,[34] the chilling effect on offers,[35] and the impact of Assistant Finance Director Baptie's letter in stopping thirty one million dollars of interstate

[30]397 U.S. 137, 142 (1970).

[31]577 F.2d at 1282.

[32]577 F.2d at 1283.

[33]577 F.2d at 1283.

[34]Id.

[35]Id.

commerce.[36] In addition the Idaho statute alters disclosures in other states[37] and there are potentials of conflicts between the states which were evidenced by the possible conflicts between Idaho, New York and Maryland.[38]

The legitimate local interests were also discounted because investor protection was not guaranteed[39] by the statute and civic responsibility could be achieved by less burdensome regulation.[40]

Even if the *Pike* balancing test is accepted as the standard to be applied, the state statutes do not constitute an undue burden on interstate commerce. State and federal regulation of the securities industry has always been one of concurrent jurisdiction.[41] Indeed, state laws in the securities field predate the federal securities acts and have previously withstood constitutional challenge based upon the commerce clause.[42] Section 28(a) of the 1934 Act, as the Fifth Circuit recognized, is a preservation of state authority not a declaration of its permissible scope.[43] It cannot be said therefore that the field of securities regulation is subject to a pervasive federal scheme or demands a uniform national rule such as to displace state tender offer statutes.

The fundamental issue is, however, not whether the states have legitimate local interests. We have previously demonstrated the benefits for investors derived under the

[36]Id at 1284.

[37]Id.

[38]Id.

[39]Id at 1285.

[40]Id at 1286.

[41]See N. 16 *supra*.

[42]*Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917).

[43]577 F.2d at 1281.

state statutes.[44] The issue is what interest does a state have in regulating a tender offer which admittedly has extra-territorial impact.

Contrary to the view of both the district court and the Fifth Circuit a tender offer is not an unrelated series of isolated securities transactions.[45] A tender offer, if successful, represents a dramatic change in the offeree corporation. A new board of directors is elected with consequent changes in fiduciary relationships.[46] Voting power of shareholders is diluted and often there is a subsequent merger.[47] These results are particularly true in a pro-rata offer such as the case in issue. Invariably the offeree shareholders remain in a minority position as a result of a pro-rata acceptance of shares. Even in a cash offer for any and all outstanding shares, a certain percentage of the offeree shareholders will not tender and remain therefore in a minority position in a corporation which is now controlled by the offeror. A tender offer is therefore a complete change in the offeree corporation. It is not merely a sale between shareholders or a potential shareholder. It represents a restructuring of the internal affairs of the offeree corporation.

Beyond question the regulation of internal affairs of corporations has always been a subject matter of regula-

[44]See N. 23 and accompanying test. A thorough analysis of state benefits is to be found in 53 N.Y.U.L. Rev. No. 4, § 92 (1978). Also note Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. L. Rev. 722 (1970).

[45]577 F.2d at 1280 n. 53, "Second a tender offer involves the sale of securities from one shareholder to another, not a change in the corporation itself."

[46]Shipman, N. 44 *supra*.

[47]Id.

tion by the states.[48] Indeed, Congress, in approaching tender offer regulations, drew parallels to proxy contest which have consistently been an area of state and federal regulation.[49] It is completely legitimate therefore for the states through their tender offer laws to regulate the internal affairs of a corporation subject to a tender offer and that jurisdiction resides appropriately in the state of incorporation or where that corporation has its principal place of business.[50] In the matter at issue the Sunshine Mining Corporation had over fifty percent of its assets located in the State of Idaho as well as the company's principal offices. Historically, mining operations have been subject to regulation where the majority of the mines are located which in this case is Idaho.[51]

The indication by the Fifth Circuit that Idaho impermissibly overstepped its bounds by extraterritorially regulating when it had only two percent of the Sunshine shareholders misconceives the corporate nature of a tender offer and would seem to suggest that blue sky regulation based upon the number or a percentage of shareholders within

[48]*Travelers Health Ass'n. v. Virginia*, 339 U.S. 643 (1950); *Cort v. Ash*, 422 U.S. 84 (1975); *Santa Fe Industries v. Green*, 430 U.S. 462 (1977); *Piper v. Chris Craft Industries Inc.*, 430 U.S. 1 (1977).

[49]Senate Committee on Banking and Currency, Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids, S. Rep. No. 550, 90th Cong. 1st Sess. (1967) at 3.

[50]43, N.Y.U.L. Rev. No. 4. 929-939.

[51]The federal courts have consistently held that the principal place of business of a mining corporation is the state in which most of its mines are located. See *Continental Coal Corp. v. Roszelle Brothers*, 242 F. 243 (6th Cir. 1917); *Riggs v. Island Creek Coal Company*, 387 F. Supp. 1363 (S.D. Ohio 1974); *Spector v. Rex Sierra Gold Corp.*, 227 F. Supp. 550 (S.D.N.Y. 1964); *Hodges v. Georgia Kaolin Co.*, 207 F. Supp. 374 (M.D. Ga. 1962); *Potoeni v. Asco Mining Company*, 196 F. Supp. 912 (W.D. Pa. 1960); *Webster v. Wilke*, 186 F. Supp. 199 (S.D. Ill. 1960).

a given state is more appropriate and would not transcend any constitutional prohibition. We suggest that the adoption of a blue sky approach to the regulation of tender offers invites participation by a multitude of states, overlooks the corporate impact of a tender offer and is far less appropriate than the specialized legislation, designed for the very topic, which presently exists. The history of tender offers to date does not support the thesis that a multitude of states will impose conflicting regulations through their respective tender offer statutes on an offeror.[52] In the case at issue, while it was alleged that three states could have asserted jurisdiction, in fact, only one did, Idaho.

When appropriately viewed as the regulation of internal corporate affairs, the state statutes are well in bounds of any commerce clause guidelines. The legitimate local interest of the states do not burden commerce; indeed, they are a continuation of state participation in a recognized field. They preserve recognized fiduciary relationships between a shareholder and corporate management. They preserve an orderly corporate reorganization and provide time for a thorough analysis of the ramifications of a takeover bid on the part of offeree shareholders and management.

III. JURISDICTION

As a threshold question the Fifth Circuit and the district court determined that personal jurisdiction over the Idaho state officials was proper in the Northern Federal District of Texas. The Fifth Circuit based the assertion of jurisdiction upon the Texas long arm statute, Tex. Civ. Stat. Ann. art. 2031 (b) (Vernon, 1964) and independently

[52]The clearest example of state cooperation is the tender offer of United Technologies for Babcock and Wilcox where the New Jersey securities authorities relied on testimony produced in Ohio hearings for review under the New Jersey takeover act.

upon § 27 of the 1934 Securities Exchange Act, 15. U.S.C. § 78aa (1976). In making these determinations the Fifth Circuit established, over the dissent of Judge Godbold, new theories for the assertion of jurisdiction over a state official which will undoubtedly have significant impact not only in the field of tender offers but in the whole of state and federal relations. In support of the Idaho officials, the State of Ohio submits that the affirmance of the district court by the Fifth Circuit was in error.

A. Ex parte Young

The fundamental principles of federalism and comity are reflected in the Eleventh Amendment to the United States Constitution and its prohibition of suits against the states by foreign citizens. However, in recognition of the need to reconcile the competing demands of federal and state authority, this Court established the principle in *Ex parte Young*[53] that a state official could be subjected to suit in his individual capacity when that official sought to enforce an unconstitutional state statute. The decision in *Ex parte Young* has often been analyzed as the creation of a necessary fiction in order to effectuate the superior demands of the Federal Constitution.[54] The Idaho officials recognize the viability of the *Ex parte Young* doctrine. The Fifth Circuit, however, extended the doctrine considerably further than the principle of stripping a state official of his Eleventh Amendment immunity. The Fifth Circuit interpreted *Ex parte Young* to include permitting suits against state officials for all purposes in a foreign forum. Judge Godbold in his dissent correctly points out that the repercussions of such a conclusion will subject state officials to actions in a multitude of foreign jurisdic-

[53]309 U.S. 123 (1908).

[54]577 F.2 at 1265 citing L. Tribe, American Constitutional Law, 146 (1978).

tions.[55] The factual pattern in *Ex parte Young* simply does not support the Fifth Circuit's conclusion that a state official once stripped of the state's immunity, is a private litigant for all purposes and can be subject to a suit in any district where he could foresee possible consequences. *Ex parte Young* has never been extended to permit suits against state officials outside of their home districts, and the principles of federalism argue against any assertion of jurisdiction beyond that scope.[56]

B. Personal Jurisdiction Under The Texas Long Arm Statute

Coupled with the finding that *Ex parte Young* does not preclude suits against state officials in a foreign forum, the Fifth Circuit determined that personal jurisdiction over the Idaho officials was proper under the Texas long arm statute, Tex. Civ. Stat. Ann. art. 2031(b) (Vernon 1964). The Fifth Circuit concluded that the due process requirement of "minimum contacts" established by this court in *International Shoe v. Washington*[57] was fulfilled by the Idaho officials because their actions in enforcing their own state statute caused "foreseeable consequences" in the state of Texas.[58]

The foreseeable consequences test established by the Fifth Circuit represents a completely new approach to the assertion of jurisdiction over a state official, and does considerable harm to jurisdictional principles established by this court. Furthermore, it is not grounded upon a thorough analysis of the statute involved. The language

[55]577 F.2d at 1296. J. Godbold dissenting.

[56]*Judice v. Vail*, 45 U.S.L.W. 4269 (March 22, 1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1940).

[57]326 U.S. 310 (1926).

[58]577 F.2d at 1266-1270.

of the Texas long arm statute is directed at commercial activity. Factually, the Idaho officials acted solely in Idaho to enforce the Idaho statute. They were not engaged in any commercial activity. The Fifth Circuit seeks to circumvent this infirmity by stating that the "business" of Idaho is to regulate.[59] But this finding is inconsistent with the interpretation which the Fifth Circuit places upon *Ex parte Young* when it indicates that the state has no business in this matter. The court cannot on the one hand indicate that a state official is stripped of his state interest for purposes of initially commencing suit and on the other hand, use a state interest as a basis for jurisdiction in a foreign forum.

The initial internal inconsistencies of the decision only point to greater infirmities in the "foreseeable consequences" test. The assertion of *in personam* jurisdiction, whether grounded upon a state long arm statute or upon the 1934 Act, must fulfill constitutional requisites. The standard for *in personam* jurisdiction, as enunciated in *Hanson v. Denckla*[60] and affirmed in *Shaffer v. Heitner*,[61] is whether the defendant has purposefully availed himself of the privilege of acting in the forum jurisdiction. The Idaho officials took no actions in Texas nor have they sought any aid in enforcement from Texas authorities as the Fifth Circuit suggests would make them amenable to the long arm statute.[62] They certainly did not engage in a commercial activity in the State of Texas. The "foreseeable consequences" test simply does not support jurisdiction where the contact between the State of Idaho and the

[59]577 F.2d at 1268.

[60]357 U.S. 235 (1958).

[61]433 U.S. 186 (1977).

[62]577 F.2d at 1260.

State of Texas is so attenuated as this Court recently pointed out in *Kulko v. Superior Court.*[63]

C. Section 27 of the 1934 Securities Exchange Act

In addition to concluding that personal jurisdiction under the Texas long arm statute was appropriate, the Fifth Circuit affirmed the district court's finding that jurisdiction over the Idaho officials was also appropriate pursuant to § 27 of the 1934 Securities Exchange Act, 15 U.S.C. § 78aa, (1976).[64] This conclusion was predicated upon the finding that § 28(a) of the 1934 Securities Exchange Act created a duty upon the state officials not to enforce unconstitutional state statutes. Since § 27 postulates jurisdiction on the basis of violation of the 1934 Act, it is inescapable that the court concluded that the state officials had violated the 1934 Act.

As previously indicated § 28 of the 1934 Act does nothing more than preserve existing state authority in a recognized field of concurrent jurisdiction, namely, securities regulation. There is no prohibitive language in § 28(a) which would give rise to a violation of the 1934 Act by a state securities administrator.

The 1934 Act was designed to regulate stock manipulations and to prevent fraud in the sales of securities.[65] It is inconceivable that the state securities administrators who work with the Securities and Exchange Commission in the enforcement of securities laws are subject to the same criteria for jurisdiction as a stock manipulator. Section 27 was designed to afford jurisdiction to a plaintiff claiming to be a victim of interstate fraud if an event of material importance to a defendant's violation occurred

[63] 98 S. Ct. 1690 (1978).

[64] 577 F.2d at 1271; 439 F. Supp. at 430.

[65] *Hooper v. Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir., 1960); cert. denied 365 U.S. 814 (1961).

in the forum district.[66] The claim by Great Western is that the Idaho officials violated the 1934 Act by enforcing the Idaho statute in Idaho. Presumably because that Idaho statute is preempted by the Williams Act, it is a violation of the Williams Act. Neither § 28(a) nor any other portion of the 1934 Act supports such a thesis.

CONCLUSION

Corporate tender offers represent a valid and lawful mechanism for the acquisition of a corporation through direct access to the offeree corporation's shareholders. They require regulation however, as both the states and the Federal government have recognized. The state takeover acts, as part of that regulation, impact the tender offer process in several extremely beneficial ways. State takeover acts have produced a bidding market for the shares of the offeree corporation through which target shareholders have benefited to an overwhelming degree. At the same time these statutes have resulted in a termination of the "Saturday night special" and as a corollary have provided shareholders with additional time to review and reflect upon their decision on whether to tender their shares.

These statutes have not been preempted as a result of the Williams Act nor do they unduly burden interstate commerce. There is no conflict between the Williams Act and the state tender offer statutes. Both seek to accomplish the identical result – investor protection – and they differ only in the time frames provided. Furthermore, these statutes are a continuation of the recognized authority on the part of the states to regulate internal corporate affairs. Such regulation does transcend any commerce clause limitation on the legislative power of state governments.

[66] Id.

The assumption of jurisdiction by the district court and the affirmance of that jurisdiction by the Fifth Circuit transcends recognized principles of federalism and violates due process and fundamental fairness. For these reasons, the decision of the Fifth Circuit must be reversed.

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